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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

WILLIAM J. BAUERS, JR.,

Petitioner

v.

HERBERT T. HEISEL, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF QUESTIONS INVOLVED.

I. Is a New Jersey County Prosecutor entitled to judicial immunity from suit under the Civil Rights Act, Rev. Stat. sec. 1979 (1875), 42 U. S. C. sec. 1983 (1964), where the sentencing Court had jurisdiction over the defendant-prisoner (Petitioner here) and the County Prosecutor acted within the jurisdiction of his office?

II. Are criminal statutes to be applied retroactively?

STATEMENT OF FACTS.

On November 7, 1950, a detective of the N. J. State Police swore out complaints in the Municipal Court of Readington Township, Hunterdon County, N. J., charging William John Bauers with (1) escape, October 30, 1950, from Annandale Reformatory, a penal institution of New Jersey for first offenders between the ages of 16 and 26, located at Annandale, N. J., and (2) larceny, October 30, 1950, of an automobile, both offenses in Readington Township, aforesaid. Thereafter, on January 3, 1951, the Hunterdon County Grand Jury returned indictments on both complaints, No. 3733, Escape (R. S. 2:126-6) and No. 3733A, Larceny of Auto (R. S. 2:145-6). Meanwhile, Bauers was incarcerated in the State Prison at Trenton.

On November 10, 1950, William J. Bauers, the Petitioner, signed a statement at the Essex County Jail in Newark confessing the escape and auto larceny in Hunterdon County, aforesaid. While at large from Annandale as aforesaid, the Petitioner was indicted and convicted in Essex County:

> (1) on January 2, 1951, of Assault with Intent to Rob (No. 653 Term of 1950) sentenced to State Prison January 17, 1951, "minimum term of Four years, and for a maximum terms of Six years, at hard labor &c" Appendix A (p. 23, *infra*), and
>
> (2) on January 2, 1951, of Larceny of Motor Vehicle (No. 660 Term of 1950), sentenced January 17, 1951, to State Prison for "a minimum term of Four years, and for a maximum term of Six years, at hard labor upon this conviction, without costs. This sentence to commence on and after the expiration of a previous sentence imposed upon this defendant on Conviction No. 653." Appendix A (p. 24, *infra*).

On February 10, 1951, the Petitioner sent Respondent, then County Prosecutor of Hunterdon County, a letter re-

questing information as to whether the Prosecutor's Office had any Detainer against him and if so, asking that they be disposed of. As a matter of fact, Petitioner knew when he wrote the letter that Detainers were filed against him because in his Brief filed in the N. J. Superior Court, Appellate Division, he stated (p. 4):

> "On Jan. 17, 1951, Appellant was sentenced to the N. J. State Prison at Trenton, for crimes committed in Essex County. Upon arrival at the State Prison he was notified that a detainer, for the above escape and auto larceny, was filed with the Principal Keeper of the State Prison." (Cited to show one of many demonstrable inaccuracies and misstatements in Appellant's pleadings.)

On May 12, 1952, Respondent wrote a letter to the State Prison asking the authorities there to ascertain whether or not Bauers desired to enter pleas to the indictments. On May 15, 1952, Mr. Feehan, Admission and Record Clerk of the State Prison, wrote to Respondent stating:

> "I have had Bauers interviewed with reference to yours of May 12th and he claims that he would like to talk the situation over with counsel." Appendix B (p. 26, *infra*). (Cited to show misstatement in Appellant's Brief to N. J. Superior Court, Appellate Division, p. 4, para. 3.)

On June 23, 1952, Respondent wrote a letter to Petitioner at the N. J. State Prison reminding him of the indictments and the charges therein and asking him to inform Respondent whether he, Petitioner, intended to plead or stand trial. Appendix C (p. 27, *infra*). On or about July 14, 1952, Petitioner commenced proceedings to have the indictments against him dismissed, which proceedings were not concluded until sometime in late April or early May, 1953, when Hon. Frederic R. Colie, Assignment Judge, N. J. Superior Court, dismissed the proceedings. (Cited to show

another misstatement in Appellant's Brief to N. J. Superior Court, Appellate Division, p. 4, para. 4, wherein Appellant said:

> "Appellant wrote five separate letters to Hunterdon County Prosecutor, whereby Appellant sought a disposition of the charges of escape and larceny, but no reply or legal responses ever materialized until appellant wrote a letter to the Assignment Judge of Hunterdon County and complained under the speedy trial clause.")

The letter Petitioner refers to as written to the Assignment Judge was actually another Motion to dismiss the indictments. Appendix D (p. 28, *infra*). This Motion was dismissed, as stated previously, in late April or early May, 1953.

In the interim, between June 23, 1952 and May 21, 1953, the aforesaid proceedings to dismiss were pending, but Respondent wrote letters to Petitioner at N. J. State Prison on July 21, 1952, February 6, 1953, and May 18, 1953, all in connection with Petitioner's case. (Cited to show another of Appellant's misstatements in the Brief filed in N. J. Superior Court, Appellate Division, p. 4, para. 4.)

Meanwhile, the Prosecutor's Office had been engaged in the trial of two important criminal cases, State v. Zambeck and State v. Volkert, which made is impossible to dispose of any other criminal trials. The Prosecutor's Office force consisted of Respondent, one detective and one secretary. In addition, trial or petit juries in Hunterdon County at that time sat three times each year for periods of one to two weeks only and during that time the civil list was also tried so that there were only limited opportunities to bring on criminal trials.

The letter of May 18, 1953, from Respondent to Petitioner informed Petitioner that the two indictments against him would be tried on May 21, 1953, at the Court House in Flemington, and that the proper writs would be in the hands of the prison authorities. Respondent assumed that Peti-

tioner had consulted counsel as he previously said he intended to do.

On May 21, 1953, the Petitioner was brought to the Court at Flemington pursuant to Writ of Habeas Corpus issued for that purpose. According to the minutes of the County Criminal Court, Petitioner requested counsel and the Court appointed Lloyd Fisher, Esq., who was at that time recognized as the most eminent criminal defense attorney in Hunterdon County. Petitioner consulted with his counsel and thereafter retracted his previously entered pleas of not guilty and entered pleas of guilty and was sentenced to State Prison, receiving concurrent sentences on each of the two indictments of 2-3 years at State Prison, which sentences were to run concurrently with any other sentences Petitioner was then serving. Petitioner was then serving the two consecutive sentences of 4 to 6 years each on the Essex County indictments set out on page 1.

As pointed out by Judge Goldman in his opinion, p. 5, para. 2:

> "The record office at the State Prison considers that the defendant completed the maximum on the May 21, 1953 Hunterdon County sentences in question as of April 6, 1955. Thus, when Bauers was paroled on June 6, 1955 on the Essex County sentences he was then serving, he had served his time on the Hunterdon County judgment of conviction."

Judge Goldmann also found, p. 5, para. 2, that the Hunterdon County convictions of May 21, 1953, do not enter into Petitioner's parole classification:

> "He has been classified as a third offender for parole purposes, based on (1) the Essex County convictions in January 1951; (2) the federal conviction for robbery in California in August 1956, and (3) the Essex County and Hudson County convictions just mentioned." (viz., Essex County Oct. 26, 1960, 3-5 years; Hudson County March 10, 1961, 7-10 years, and 3-5 years concurrent.)

The Brief filed for the State of New Jersey in the N. J. Superior Court, Appellate Division, proceedings failed entirely to present for the State any of the facts which Respondent has presented in this Statement and particularly the fact that classification materials were supplied by the various state institutions to the sentencing court in lieu of pre-sentence reports made by the County Probation Office, which are referred to in Judge Goldmann's decision, page 8.

After Petitioner's guilty plea, conviction and sentence on May 21, 1953, Respondent had no notice or communication of any kind about the *Bauers* case until February 1, 1965, when Respondent received a letter from J. Walter Morse, Deputy Clerk, U. S. District Court at Trenton, enclosing copy of Notice of Appeal, copy of Complaint and Order Dismissing Complaint (by Judge Lane). Respondent's term as County Prosecutor expired on March 14, 1958. Both the sentencing Judge, Hon. Henry F. Schenk, who was also Judge of the Juvenile and Domestic Relations Court, and Lloyd Fisher, Esq., who represented Petitioner at the time of his conviction and sentence, have been deceased for several years.

REASONS CONTRA GRANTING THE WRIT.

Point I.

At the Time of Indictment, Conviction and Sentence of the Petitioner, the County Court of Hunterdon County Acting Under the Law as It Existed at That Time, Had Jurisdiction Over the Defendant-Prisoner, the Petitioner.

The defendant in the complaint in this action, the Respondent in this appeal, was the duly constituted County Prosecutor of Hunterdon County, New Jersey, at the time of the arrest, indictment and conviction of the Petitioner, William J. Bauers. As such County Prosecutor he was a quasi-judicial officer entitled to the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter. The United States courts have supported this immunity in a long series of cases, among which are *Sires v. Cole,* C. A. Washington 1963, 320 F. 2d 877; *Kenney v. Fox,* C. A. Michigan 1956, 232 F. 2d 288; Certification denied 77 S. Ct. 84, 352 U. S. 855, 1 L. Ed. 2d 66 and 77 S. Ct. 84, 352 U. S. 856, 1 L. Ed. 2d 66; *Jennings v. Nestor,* C. A. Ill. 1955, 217 Fed. 153; Certification denied 75 S. Ct. 888, 349 U. S. 958, 99 L. ed. 1281; *Roberts v. Barbosa,* 227 F. Supp. 20 (1964) and *Rhodes v. Houston,* 202 F. Supp. 624 (1962) and the cases cited in Note 7 of the decision of the U. S. Court of Appeals, Third Circuit, this case.

In order for a quasi-judicial officer to be denied immunity there must be a complete lack of jurisdiction over the accused. The courts have adopted a liberal policy in determining whether or not jurisdiction exists so that such quasi-judicial officers as County Prosecutors and others may not be burdened with suits by persons who fancy they have been deprived of their rights by such officers acting in the performance of their duties.

In the light of the facts in this case, the indictment of Petitioner, William J. Bauers, was not illegal on the grounds that the Petitioner was a juvenile at the time of the indictment. Indictments of juveniles in the State of New Jersey at the time of the indictment of Petitioner for an offense committed while Petitioner was a juvenile, were not per se illegal. In the absence of any referral by the Juvenile and Domestic Relations Court, there was no other method of enforcing the criminal laws against the defendant for the offenses with which he was charged. Therefore, it is the contention of the Respondent that there was jurisdiction.

The United States Supreme Court in *Bradley v. Fisher*, 80 U. S. 335 (1871), at p. 351, stated the principles still followed, as follows:

> "In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial act, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other question involved in the case, although

upon the correctness of his determination in these particulars the validity of his judgments may depend."

The same principles were upheld in the case of *Sires v. Cole, et al.*, 320 F. 2d 877 (1963) U. S. Court of App. Ninth Ct. (1963), in which the court affirmed the principle that prosecuting attorneys are quasi-judicial officers and enjoy the same immunity from civil actions for damages and from liability under Civil Rights Act as that which protects a judge. In that case the basis of the complaint was the plaintiff's allegation that he was convicted on his plea of guilty to a misdemeanor but he was sentenced as for a felony and consequently confined for a longer period than authorized by statute and in an institution where only felons were imprisoned. The judgment of the district court dismissing the complaint was affirmed. This case cites numerous cases on this point.

In the case of *Johnson v. MacCoy,* 278 Fed. 2d 37 (1960), the plaintiff sued the defendant, who was a Judge of the Municipal Court of Los Angeles, alleging that the defendant had knowingly acted "in clear absence of jurisdiction" in issuing felony complaints against the plaintiff on two different dates. The first proceedings were dismissed by another Judge of the City of Los Angeles upon the ground that the said Municipal Judge had no jurisdiction to issue a felony complaint on the complaint of a private citizen, but only at the request of a prosecutive agency of the State of California. In a decision affirming the dismissal of the civil complaint by the lower court, the Court said:

> "There being no sufficient or any showing that the act of the appellee complained of was clearly done in the absence of jurisdiction; it being within his jurisdiction by the letter of the statute; and there being no allegation of facts sufficient to show an act in excess of jurisdiction, we find no basis for any excep-

tion to the general rule enunciated in Bradley v. Fisher, supra, of judicial immunity."

"The Federal Civil Rights Act adds nothing to the picture. Cf. Snowden v. Hughes, 1944, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497."

Point II.

The Indictment of Petitioner by the Hunterdon County Grand Jury and His Subsequent Conviction and Sentence Were Not Illegal Under the State of the Law as Interpreted by the New Jersey Courts at That Time; the Courts of New Jersey Have Held That Changing or New Rules and Interpretation of Criminal Law Should Not Be Applied Retroactively.

When the prisoner-plaintiff, the Petitioner, appeared for trial before the Hunterdon County Court on May 21, 1953, he was brought from the New Jersey State Prison at Trenton, N. J., where he was confined for the two offenses which he had previously committed in Essex County, N. J., namely, assault with intent to rob and larceny of an auto. Appendix A (pp. 23, 24, *infra*). (See also Appendix E for chronology of the Petitioner's activities and record in relation to this matter) (pp. 29, 30, *infra*). He had been sentenced on January 17, 1951, to two consecutive 4-6 year sentences which had resulted in his confinement at the New Jersey State Prison since January 17, 1951. On May 21, 1953, he was then twenty and a half years of age. He was no longer a juvenile deemed incapable of committing a crime, where the age is fixed at 18 years as the outer limit, under New Jersey Legislation. N. J. S. 2A:4-14. He had already served two years and four days in the State Prison when he appeared before the Hunterdon County Court for trial, and at which time he was assigned counsel to aid and advise him with regard to the matter for which he was to be tried. It has already been stated that he then changed his pleas from not guilty to guilty and was sentenced to

serve concurrently with his Essex County sentences then in effect. Thus, he received no additional sentence in effect, and this is most important, for how could the prisoner suffer an injury when he received no additional punishment?

The law of New Jersey at the time this twenty and a half year old adult appeared for trial on May 21, 1953, is worthy of a considered review. The cases of *Ex parte Daniecki,* 117 N. J. Eq. 527, 177 A. 91 (Ch. 1935) aff. 119 N. J. Eq. 359, 183 A. 298 (E. & A. 1936), and *In re Mei,* 122 N. J. Eq. 125, 192 A. 80 (1949), establish the law controlling at that time.

Ex parte Daniecki involved the indictment, trial and conviction for murder of a juvenile under sixteen years in the oyer and terminer of Union County, New Jersey. After conviction and sentence, Daniecki petitioned for writ of habeas corpus to be discharged from custody on the ground that at the time of the murder and sentence he was a juvenile under sixteen, and therefore, the court of oyer and terminer was without jurisdiction to try, convict and sentence him.

After reviewing the Juvenile and Domestic Relations Court laws then in effect, Vice Chancellor Backes said, p. 92:

> "The propriety of the indictment for murder in the court of oyer and terminer is not criticized; the contention being that the court had no jurisdiction to try, convict, and sentence the prisoner, that it should have transferred the indictment to the juvenile court for trial."

After further commenting on the Juvenile and Domestic Relations Court law, the Court said, p. 92:

> "But, whatever benevolent consideration may have moved the Legislature, it had not the power to vest jurisdiction in the juvenile court to try the crime of murder (or any other indictable offense) without a jury."

Further in the opinion, p. 92:

> "It may well be that the Legislature may vest in the juvenile court, or in any other court, jurisdiction to try indictments for crimes, but that is beside the mark. The point is that by the act under review it did not establish a court competent to try indictments for crime. The fundamental vice in the act creating the juvenile court, with exclusive jurisdiction to try juveniles for all manner of crime, is that it denies a trial by jury and requires the culprit to be tried by the judge."

The Court concluded by saying:

> "The jurisdiction of the court of oyer and terminer to try and sentence the prisoner is in no wise impaired by the Juvenile Act."

In the case of *In re Mei*, the Court of Oyer and Terminer exercised jurisdiction over a 14 year old murderer and this was upheld as being the law by New Jersey's highest court, notwithstanding the existence of the Juvenile Court Law and Legislation in existence at the time. Hence, when the prisoner in the present case appeared before the Hunterdon County Court (successor to the Court of Oyer and Terminer jurisdiction, N. J. Constitution, Art. 6, Sec. IV, para. 1) no question was raised by the defendant or his counsel challenging the jurisdiction; nor did the defendant protest the sentence, to be served concurrently with his Essex County offenses, on the basis of lack of jurisdiction. It is only after the law has evolved to a different position that the defendant attempts to show a lack of jurisdiction in the court where he was treated so mildly, and where the Prosecutor, now the Respondent, was duty bound under the state law to move his case. N. J. Constitution, Art. 7, Sec. II, para. 1, and N. J. S. 2A:158-1 et seq.

There has been development and change in the law since May 21, 1953, and it is the retroactive application of the law as it has evolved that the Petitioner attempts to

use as a sword to force damages from an officer of the court who was acting within the color of his office, without malice toward the prisoner-plaintiff with whom he had no personal acquaintance at the time, nor since. Let us demonstrate the evolvement of the law from the time of *Ex parte Daniecki* (1936) through *In re Mei* (1949).

In 1954 the N. J. Supreme Court in its decision in *State v. Monohan,* 15 N. J. 34, 104 A. 2d 21, changed the law from that of Ex parte Daniecki and In re Mei, holding for the first time that where a teen-age murderer under the age of 18 was involved in a robbery-murder, the court where jurisdiction first vested was the Juvenile Court, the Court saying, p. 21:

> "Prompted by mid-Twentieth Century sociological precepts, our Legislature has directed that children under 16 who commit any offenses which would be criminal if committed by adults, shall not be triable in criminal proceedings but shall be dealt with exclusively by our specialized juvenile courts."

See further at p. 25:

> "In In re Mei (previously cited) the question was again raised as to whether a 15-year-old was triable for murder in the same manner as an adult; the court held that he was notwithstanding the express terms of L. 1935, cc. 284, 285. It did not suggest that the Legislature intended to exclude murder from its comprehensive enactments; nor did it adopt the sweeping view of unconstitutionality expressed in the Daniecki case and later rejected in the Goldberg case."

At page 33 the Court said:

> "But, by the same token, there is no statutory distinction in this regard between 'capital' and 'non-capital' acts or offenses. A delinquent of 16 or 17 years is made criminally responsible in the given cir-

cumstances, but under the safeguard of all constitutional guaranties, rather than the object of reformative measures merely under the Juvenile Act."

So the unsettled state of the law in New Jersey under which juveniles were to be charged at the time of the indictment and conviction of Petitioner is apparent. It is equally apparent that at the time of the indictment and conviction of Petitioner the *Daniecki* and *Mei* cases controlled.

In 1959, in *In re Smegelski,* 30 N. J. 513, 154 A. 2d 1, the Court for the first time held that the date of the offense controlled the court to which the prisoner should be brought for trial. However, the court was careful in its language, indicating that only ordinarily would this be the policy, because it would no longer serve any useful purpose for the Juvenile Court to have jurisdiction of a prisoner who committed an offense while under the age of 18 and apprehended later when over the age of 18. Certainly, some ridiculous applications of that state of facts could be fancied but why belabor the point? In the present case, what useful purpose could have been served if the prisoner was taken before the Juvenile and Domestic Relations Court and sentenced to Bordentown or Jamesburg, institutions for juvenile multiple offenders, when he was already serving a sentence in the N. J. State Prison on the Essex County offenses? However, the evolvement of the law should not be something which the prisoner can use retrospectively, because the retroactive effect of the law and its application from the standpoint of later and perhaps enlightened or unenlightened decisions (depending upon the reader's point of view), would be an unfair application and analogous to "ex post facto" judicial legislation. The New Jersey Supreme Court reviewed this very problem in the case of *State v. Johnson,* 43 N. J. 572, 206 A. 2d 737 (Sup. Ct. 1965), — U. S. —, 16 L. ed. 2d 882, 86 S. Ct. — (#762) (June 20, 1966) and with regard to retroactive effect of decisions came to the conclusion that decisions in crim-

inal cases should not have retroactive effect, saying at p. 743:

> "Society reasonably expects that when a man is convicted of a crime by a method not considered unfair according to the rules of law then in effect, that conviction will stand. Therefore, unless some countervailing considerations of 'the deepest sentiments of justice' compel otherwise, a new rule of criminal law should not be applied retroactively."

Consequently, if the state of the Law at the time of trial and sentence was such that the Hunterdon County Court had jurisdiction, as has been demonstrated in this point, then there was no civil right of which Petitioner was deprived at that time. If subsequently, over a six year period, the law evolves to another position and escalates rights to another plateau, then certainly a prosecutor-defendant in a suit some twelve years later cannot be liable, because he has a right to rely upon the state of the law at the time of his duty to perform his office.

On the other hand, assuming without admitting that there was a civil right in existence in 1953 to which the Petitioner had a claim, and further assuming that the state of law was as the prisoner-plaintiff contends, or even given retroactive treatment, what possible harm did the plaintiff-prisoner suffer, considering that he was given sentences to run concurrent with the sentences he was then serving in the New Jersey State Prison for the Essex County offenses. He would have served no additional time in the New Jersey State Prison; and he was classified exactly as he would have been classified had the Hunterdon County offenses never been committed. Petitioner alleges that his parole status is affected by the record of convictions in Hunterdon County but that is not so, as found and decided by Judge Goldmann, p. 5, para. 2 of his opinion (*supra*, p. 5).

The fact that the Hunterdon County Court sentences were set aside by the Appellate Division of the Superior

Court, to avoid prejudice to any parole rights of the prisoner, is really immaterial, because the N. J. Superior Court, Appellate Division, in further extending all doubt to the plaintiff-prisoner, little realized in its reasoning that it was giving retroactive effect to the situation in question, and there is no mention in that court's opinion of the state of the law existing at the time of trial and sentence. Rather the Appellate Division cited only subsequent cases showing the change of the law since the date of the trial. Therefore, there can be little doubt that had the matter been considered in depth, the fundamental principles involved would have become readily apparent and the setting aside of the otherwise valid plea and sentence was incongruous with the state of the law then existing.

It is with deep concern that the writer notes that never has the guilt of the plaintiff-prisoner been questioned concerning the events that brought him before the Hunterdon County Court for trial. Consequently, the court is not asked to judge an innocent man who was deprived of the due processes of law and incarcerated as a result. On the contrary, the court is asked to aid a guilty man, a multiple criminal offender at the time, who was afforded all of the processes of law then existing, including the services of eminent criminal defense counsel, and who was given concurrent sentences, now to have a remedy and damages against County Prosecutor who was obliged to perform the functions of his office upon his oath and under Law.

This whole procedure and suit are incongruous with the Civil Rights Act, the purpose of which was to guarantee due process of law and equal treatment under the law. The law in effect at the time of the trial and sentence was such as to confer jurisdiction and defendant was accorded all of his rights when he was before the court, including experienced counsel. It should also be noted from Appendix E that the plaintiff-prisoner was not unacquainted with the court procedures, sentences and jails at the time, since he had had previous experiences prior to the time of this in-

cident in 1953. The court in *State v. Johnson* expressed the same thought in these words:

> ". . . where a conviction was obtained as a result of a procedure not considered fundamentally unfair at that time and subsequent judicial decisions cast no substantial doubts upon the reliability of the determention already made, no compelling reason exists for disturbing a decision no longer subject to direct appeal."

It is submitted that if these facts and this law had been brought to bear upon the Appellate Division at the time of the prisoner's request, especially when one considers this is the language of New Jersey's highest court, then the Cavalier treatment of setting the sentences aside upon the basis of subsequent law would not and should not have occurred.

In conclusion to this point, the essence of the question must be the state of the law as it existed at the time of the trial and the jurisdiction of the court then acting, because the County Prosecutor was merely an officer of that court. If that court had jurisdiction to act under the law as it then existed, certainly the officer who was duty bound to perform his duties should be protected by the jurisdiction of that court and the state of the law in force at the time under which the court was acting.

Point III.

Is a New Jersey County Prosecutor Entitled to Judicial Immunity From Suit Under the Civil Rights Act Where the Acts Complained of Are Within the Jurisdiction of His Office?

The United States Court of Appeals for the Third Circuit decided that "the sole issue raised is whether the defendant acting as the Hunterdon County Prosecutor is immune from suit *until* (under) the Civil Rights Act, 42 U. S. C. sec. 1983, R. S. sec. 1979." 361 F. 2d 581, 584 (1966).

The two preceding points in this Brief amply prove that the Respondent was acting within the jurisdiction of his office at all times relevant hereto. The Court of Appeals so found in three distinct instances, viz.:

> (1) "The main thrust of the complaint is that the defendant knew or should have known that appellant had not reached the age of eighteen when the alleged offenses were committed, and that in procuring the indictments against him and the resulting pleas, sentences and incarceration, appellant was denied his liberty without due process. Assuming arguendo that this denial of liberty and the denial of a speedy trial abridged appellant's constitutional rights, so as to bring him within 42 U. S. C. sec. 1983 in that regard, we cannot perceive that the defendant acted clearly outside his jurisdiction in either matter.
>
> (2) "We have already indicated that the primary responsibility of a prosecutor is to vindicate the wrongs which have been committed against society. This is precisely what appellee was doing when the denial of appellant's liberty occurred. The mere fact that the New Jersey Legislature had excised from his responsibility the prosecution of individuals who were under the age of eighteen when they committed acts which would otherwise be punishable offenses does not indicate that he was acting clearly outside his jurisdiction. On the contrary, it would be difficult to envision a case which was as close to his jurisdiction, but, yet, in excess of it."
>
> (3) "As to the denial of a speedy trial, even if we assume that the defendant was responsible for the delay, we believe that motions for continuances or other causes of delay are well within the jurisdiction of the prosecutor." 361 F. 2d 581, 591 (1966).

Therefore, in the light of the plethora of cases cited by the Court of Appeals decision (361 F. 2d 581, 586 (1966)

note 7), it would seem to belabor the point unreasonably to argue this point beyond the decision of the Court of Appeals.

Petitioner stresses the point that:

> "Review of the cases brought under the Act shows that the defendants most commonly joined in these actions are police officers, prosecutors and judges. Frequently, all three are sued together. In passing upon claims against these three classes of officers the courts, while disagreeing from court to court upon the proper rationale, have generally given the same scope of immunity from liability to judges and to prosecutors indiscriminately and, prior to this Court's decision in Monroe v. Pape, 365 U. S. 167, often to police officers as well." Brief for Petitioner, p. 9.

Ergo this Court should decide separately and specifically whether a County Prosecutor (to the exclusion of similar officers) should be immune from civil suit under the Civil Rights Act, notwithstanding that of the 48 cases cited by the Court of Appeals in this case (361 F. 2d 581, 586 (1966), note 7), 21 deal specifically with the office of County Prosecutors and State's Attorneys. Furthermore, five circuits and several district courts have adopted the doctrine of immunity to such officers as established in the cited cases.

The Petitioner taking Judge Biggs' opinion (Brief for Petitioner, p. 22a) claiming that "the present decision emasculates the Civil Rights Act in the Third Circuit" (Brief for Petitioner, Point C, p. 16) fails to read the majority decision where the Court of Appeals clearly shows a limited immunity doctrine. This is based upon "the clear-absence-versus-mere-excess-of-jurisdiction" theory. The reasons supporting the theory are lucidly stated in note 9 of the majority decision of the Court of Appeals.

Point IV.

This Case Does Not Merit Certiorari Because the Statute of Limitations Has Long Since Run on Any Cause of Action Petitioner May Have Had, (If Indeed There Were One); No Damage Was Sustained by Petitioner, (If There Was a Cause of Action Initially); as a Result of Certiorari the Court Would Be Dealing With a Mere Academic Point of Law Better Resolved in a Case Clearly Stating a Cause of Action and Damages.

Cases decided under 42 U. S. C. 1983 hold that the State Statute of Limitations applies to the section of law in question where there is no Federal limitation on the statutory remedy. (See *O'Sullivan v. Felix,* 34 S. Ct. 596, 233 U. S. 318, 58 L. Ed. 980 (1914); *Swan v. Board of Higher Ed. of City of New York,* C. A. N. Y. 1963, 319 F. 2d 56; *Hoffman v. Halden,* C. A. Or. 1959, 268 F. 2d 280; *Mohler v. Miller,* C. A. Mich. 1956, 235 F. 2d 152; *Wilson v. Hinman,* C. A. 1949, 172 Fed. 2 914, Cert. denied 96 S. Ct. 933, 336 U. S. 970, 93 Fed. 1121; and other cases noted in Footnote 224 to 42 U. S. C. A. 1938 at pages 196 and 197.) In this case the applicable state statute is N. J. S. A. 2A:14-1 which provides for a six year limitation for any tortious injury, except personal injury and slander, which are two and one year limitations, respectively. The cause of action in this instance arose at the earliest when the indictment was procured (January 3, 1951) or when the defendant pleaded guilty and was sentenced by the Court (May 21, 1953). At the time of conviction after his guilty plea the Petitioner was age 20 years, 5 months and 5 days; therefore, 6 months and 25 days short of being an adult who could have then brought a suit. Six months and twenty-five days later, or on November 26, 1953, he was 21 years of age and had six years from that date to start his action. Therefore, on November 7, 1959, the cause of action, if there were one, had ceased to exist. See N. J. S. A.

2A:14-21 concerning the disabilities of those under 21 years and the extension of periods of limitation for minors. An action accrues on an attorney's misfeasance or nonfeasance at the time of the neglect or misconduct. Therefore, assuming that the Petitioner is correct in his statement that the Respondent "knowingly or negligently" failed in his duty then the cause of action arose at the time of the alleged neglect or misconduct. (See *Sullivan v. Stout,* 120 N. J. L. 304, 199 A. 1, 118 A. L. R. 211 —— Crt, 1938.) As a consequence, the Petitioner in asking for Certiorari is asking for a decision on a moot point, which, while probably a defense point at trial, would be dispositive of the matter at trial level. Rather than decide a mere moot academic point, would it not be better to consider the point now, put the matter in focus, and if valid, put the matter to rest by denying Certiorari.

Coupled with the Statute of Limitations argument is the issue of damages. Looking briefly at the point, the Petitioner, after pleading guilty, received a sentence to run concurrently with another valid longer sentence he was then serving from another jurisdiction. The time given him on the concurrent sentence expired prior to the time he served on the longer sentence from another jurisdiction. Consequently, not one additional day of incarceration resulted to him and as Judge Goldmann noted, the conviction and sentence did not enter into Petitioner's parole classification. Brief for Petitioner, p. 36a. Query: Wherein does the damage lie, even assuming a valid cause of action still extant? To ask the question is to answer it: there are no damages. Again this is an academic question not meriting Certiorari.

CONCLUSION.

For the reasons stated in the decision of the Court of Appeals for the Third Circuit and for the reasons and arguments stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT T. HEISEL, JR.,
32 Bridge Street,
Frenchtown, New Jersey 08825,
Attorney Pro Se.

Of Counsel:

THOMAS J. BEETEL,
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40 Delaware Avenue,
Lambertville, New Jersey 08530.

APPENDIX A.

ESSEX COUNTY COURT

LAW DIVISION—CRIMINAL

HON. JOSEPH E. CONLON,

Presided

No. 660 Term of 1950

THE STATE

v.

WILLIAM J. BAUERS, JR.

On Indictment & Conviction For Larceny of Motor Vehicle

November 27, 1950. Indictment presented by Grand Jury.

December 4, 1950. Defendant pleaded Not Guilty.

January 2, 1951. Defendant retracted plea of Not Guilty and entered plea of Non Vult.

January 17, 1951. The Court ordered and adjudged that the said defendant, William J. Bauers, Jr., be imprisoned in the State Prison of this State for a minimum term of Four years, and for a maximum term of Six years, at hard labor upon this conviction, without costs. This sentence to commence on and after the expiration of a previous sentence imposed upon this defendant on Conviction No. 653.

ESSEX COUNTY COURT

LAW DIVISION—CRIMINAL

HON. JOSEPH E. CONLON,

Presided

No. 653 Term of 1950

THE STATE

v.

WILLIAM J. BAUERS, JR.

On Indictment & Conviction
For Assault with Intent to Rob

November 27, 1950. Indictment presented by Grand Jury.

December 4, 1950. Defendant pleaded Not Guilty.

January 2, 1951. Defendant retracted plea of Not Guilty and entered plea of Non Vult.

January 17, 1951. The Court ordered and adjudged that the said defendant, William J. Bauers, Jr., be imprisoned in the State Prison of this State for a minimum term of Four years, and for a maximum term of Six years, at hard labor upon this conviction, without costs.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

I, RUSSELL C. GATES, Clerk of the Essex County Court, in and for the County of Essex in the State of New Jersey, Do HEREBY CERTIFY that the foregoing are true and correct copies of the records of conviction in the cases of The State vs William J. Bauers, Jr. sur Indictment #653 Term of 1950 for Assault with Intent to Rob and Indictment #660 Term of 1950 for Larceny of Motor Vehicle and the same is taken from and compared with the original records of the Essex County Court and as the same now remains on the files of said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court
(Seal) and County at Newark, N. J., this 19th day of May A. D., 1953.

RUSSELL C. GATES,
Clerk.

APPENDIX B.

STATE OF NEW JERSEY
New Jersey State Prison
Wm. H. Carty
Principal Keeper
Trenton 6, N. J.

May 15, 1952.

Mr. Herbert T. Heisel, Jr.,
County Prosecutor,
Hunterdon County Court House,
Flemington, New Jersey.

Re: William J. Bauers,
Our #29137.
Charles E. Johnson,
Our #29139, deceased.

Dear Sir:

This will acknowledge yours of May 12th with reference to the above inmates. Wish to advise that Johnson died in this institution June 8, 1951.

I have had Bauers interviewed with reference to yours of May 12th and he claims that he would like to talk the situation over with counsel, however, if you decide you would want to write Bauers in the future, please address the New Jersey State Prison, Trenton, New Jersey using the above number.

Very truly yours,

EDWARD P. FEEHAN,
Edward P. Feehan,
Admission and Record Clerk.

EPF:JKL

APPENDIX C.

June 23, 1952

Mr. William J. Bauers
N. J. State Prison
Trenton, New Jersey

Dear Sir:

There are two indictments against you in Hunterdon County, which I would like to dispose of either by your plea of guilty or non vult or by trial. One indictment charges you with Escape from Annandale Reformatory on October 30, 1950; the other indictment charges you with Theft of a 1946 Plymouth Sedan, owned by one Ruth Leineweber on October 30, 1950.

John J. O'Connell, one of the other two persons indicted with you on these same charges, entered a non vult plea on April 21, 1952 and was sentenced to Bordentown, indeterminate period.

A recent letter from Mr. Feehan informs me that you would like to talk over the situation with your counsel. I presume you have done this, and I would like to know whether you intend to plead or stand trial.

Very truly yours,

HERBERT T. HEISEL, JR.
County Prosecutor

HTH:mt

APPENDIX D.

SUPERIOR COURT OF NEW JERSEY

Chambers of
Frederic R. Colie
Judge

Court House
Newark 2, New Jersey

April 24, 1953

Hon. Herbert T. Heisel, Jr.
Court House
Flemington, New Jersey

My dear Mr. Heisel:

I enclose herewith motion for dismissal of indictments against William J. Bauers. Will you kindly advise me about this matter so that I can reply to his letter and will you also be good enough to return these papers to me as they are the only copies that I have.

Very truly yours,

FREDERIC R. COLIE

APPENDIX E.

DATE OF BIRTH OF APPELLANT: NOVEMBER 26, 1932.

Hunterdon County Action:

Oct. 30, 1950: Escape and Larceny of Auto. Age at time of offense: 17 yrs. 11 mos. 4 das.

Jan. 3, 1951: Indicted Hunterdon County. Age: 18 yrs., 1 mo. Adult at time of indictment.

May 21, 1953: Conviction on guilty pleas on both indictments, Hunterdon County. Sentence: 2-3 years State Prison, concurrent and to run concurrently with any other sentences then being served. Age at time of sentence: 20 yrs. 5 mos. 5 das. Had already served 2 years and 4 days in State Prison on Essex County sentences.

Other State, County or Federal Actions:

Dec. 1950: Essex County, N. J. Assault with Intent to Rob and Larceny of Auto. Sentence Jan. 17, 1951, on each charge, consecutively, 4-6 years State Prison at hard labor.

June 6, 1955: Parole from N. J. State Prison.

April, 1956: Fled parole in New Jersey.

Aug. 5, 1956: Bank robbery, California, and Federal Firearms Act violation. Sentence: 5 years. Paroled from Federal Penitentiary December 24, 1959.

Nov. 13, 1956: Indicted, Essex County, N. J., for Entering, Larceny and Receiving.

Oct. 20, 1960: Sentenced from Essex County: 3-5 years State Prison.

Hunterdon County Action:

Other State, County or Federal Actions:

Mar. 10, 1961: Sentenced Hudson County, N. J., 3 charges Robbery 7-10 years each, concurrent; 3 charges for being armed 3-5 years each, concurrent.

N. J. Parole classification as 3rd offender:

(1) Essex County, January, 1951

(2) Federal conviction for robbery in California, August, 1956

(3) Essex County and Hudson County, N. J., convictions, 1960 and 1961

Present release date: May 30, 1967, less future work time earned.

Federal Detainer for Violation of Parole on bank robbery charges and Federal Firearms Act violation—"590 days remaining to be served." Detainer dated July 27, 1960, issued by U. S. Board of Parole.